



September 8, 1999

Mr. Paul Sarahan  
Director  
Litigation Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR99-2493

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your requests were assigned ID# 127263 and ID# 128099.<sup>1</sup>

The Texas Natural Resource Conservation Commission (the "commission") received a request for all records relating to seventeen disposal sites. The commission received a second request for access to information regarding Sikes Disposal Pits, a Superfund site near Crosby, Texas. You state that you have made some of these records available to the requestors. You claim that the remaining documents are excepted from disclosure under sections 552.103, 552.107, 552.110 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed a representative sample of the documents at issue.<sup>2</sup>

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<sup>1</sup>Please note that we have combined ID# 127263 and ID# 128099 because these files contain some duplicate documents.

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a). You have established that several of the submitted documents relate to pending litigation. *IT-DAVY v. Texas Natural Resource Conservation Comm'n*, No. 98-07589 (200<sup>th</sup> Dist. Ct., Travis Co., Tex.). Therefore, the commission may withhold those documents from disclosure pursuant to section 552.103.<sup>3</sup> We have marked the documents accordingly.

Section 552.107(1) excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. ORD 574 at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. ORD 574 at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We have reviewed the documents for which you claim section 552.107 and marked those that the commission may withhold from disclosure under section 552.107.

You claim that several of the submitted documents are excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body.

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<sup>3</sup>In reaching this conclusion, however, we assume that the opposing party in the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in a final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990). Several of the submitted documents reflect the advice, opinion, or recommendations of commission employees on policymaking issues. The commission may withhold these documents from disclosure under section 552.111. However, we have marked three documents that relate to administrative matters, not policymaking issues, and are, therefore, not protected by section 552.111. The commission must release these documents.

Next, you contend that some of the submitted documents constitute attorney work product. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Id.* at 3-4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. *Id.* at 4. You have met both prongs of the work product test for documents relating to "the Industrial Road case," the Sikes Superfund Site, and Liberty Waste Disposal. Thus, the commission may withhold these documents from disclosure under the work product aspect of section 552.111.

Finally, some of the documents at issue were submitted to the commission by International Technology Corporation. These documents contain financial data that was marked as confidential when submitted to the commission. Pursuant to section 552.305 of the Government Code, we notified International Technology Corporation of the request for information and of its opportunity to submit arguments against the disclosure of its financial data. We did not receive a response from International Technology Corporation. We, therefore, have no basis to conclude that the financial data is excepted from disclosure. *See, e.g.,* Open Records Decision No. 552 (1990). Accordingly, the commission must disclose the financial data.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 127263

Encl. Marked documents

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